

(2013) 09 MAD CK 0342
In the Madras High Court
Case No : C.M.A. (MD) No. 736 of 2007

Employees State Insurance Corporation and The Manager
Vs
Tower Readymades

APPELLANT

RESPONDENT

Date of Decision : 04-09-2013

Acts Referred:

Employees State Insurance Act, 1948 — Section 1(5), 2(12), 45A, 75(1), 77
Factories Act, 1948 — Section 2(k)
Tamil Nadu General Sales Tax Act, 1959 — Section 18

Citation : (2014) 140 FLR 38 : (2014) LabIC 1454 : (2014) 1 LLN 716 : (2014) LLR 34

Hon'ble Judges : R. Karupiah, J

Bench : Single Bench

Advocate : P. Sermakani, for the Appellant; M. Azeem, for the Respondent

Judgement

R. Karupiah, J.—The appellants, who are respondents in the ESIOP. No. 4 of 1993, have filed this Civil Miscellaneous Appeal, as against the Decree and Judgment of the Principal District Judge cum ESI Court, Kanyakumari at Nagercoil passed in ESIOP. No. 4 of 1993, dated 18.08.2000. The respondent/petitioner partnership firm running a ready-made shop in the name and style of "Tower Readymades". A perusal of records reveal that on 03.06.1991, the respondent/petitioner's above said establishment was inspected by the Manager, Local Office, i.e., Officer of the Employees' State Insurance Corporation and filed a report in which it is stated that there were 15 employees were working in the ground floor and 6 employees were working in the first floor and to that effect, the employer given a letter, addressed to the Manager, Local Office, Nagercoil, and therefore, the above said establishment is coverable under the provisions of Employees' State Insurance Act from 01.01.1991, as its employed 22 persons for wages in January 1991. On the basis of the above said report, on 26.06.1991, Form-C11 was issued, under Sections 2(12) and 1(5) of the ESI Act 1948. On 22.08.1991 Form C-18 show-cause notice was issued and called for explanation and also on the same day, issued a show-cause notice for criminal

prosecution also. The managing partner of the respondent establishment sent a reply on 06.09.1991 in which questioning the locus standi of the Manager, Local Office, ESI Corporation by stating that he has no jurisdiction to inspect the establishment and further stated that they have never employed more than 15 persons. It is further stated that determination of contribution u/s 45-A of the Act, without granting an opportunity of personal hearing as against the natural justice and further they have not committed any offence under the provisions of ESI Act, Rules and Regulations and therefore, prayed for grant of an opportunity of personal hearing. On 15.10.1991 Form-19 was issued under the proceedings of Deputy Commercial Tax Officer, Nagercoil and confirmed the proposal and assessment and directed to pay Tax u/s 18 of TNGST Act, 1951 for the year 1991-92. On 20.11.1992 the Assistant Regional Director passed order u/s 45-A of the ESI Act, by the 1st appellant/1st respondent herein in Ref. No. SRO/MDU/IN-I/57-8095-100, in which fixed the total contribution as Rs. 6771/- for the period from 01.11.1990 to 31.08.1991 and directed to pay the amount with 12% interest within a period of 15 days and informed that failing which, the above said amount to be recovered as an arrears of revenue.

2. Aggrieved over the above said proceedings, the respondent/petitioner filed an ESIOP. No. 4/1993 under Sections 75(1) and 77 of ESI Act, before the Employees Insurance Court/District Court, Kanyakumari at Nagercoil, seeking the relief as under:-

a. To declare that the petitioner establishment is not covered under the provisions of ESI Act, 1948 and that the petitioner is not liable to pay any contribution to the respondent.

b. To set aside the proceedings of the first respondent in Ref. No. SRO/MDU/IN-I/57-8095-100, dated 20.11.1992 as illegal and invalid,

c. Restraining the respondent by an order of permanent injunction from recovering any alleged arrears of contribution;

d. For costs

e. For any other reliefs.

3. Before the Employees Insurance Court/Principal District Court, on the side of the respondent/petitioner in the above said ESIOP examined 2 witnesses as P.Ws. 1 and 2 and marked 25 documents as Exs. P1 to P25. On the side of the appellants/respondents examined 2 witnesses as R.Ws. 1 & 2 and marked 12 documents as Exs. R1 to R12.

4. The Employees Insurance Court/Principal District Court considered the above said oral and documentary evidence adduced on either side and finally held that the respondent/petitioner establishment is not covered under the provisions of ESI Act, 1948 and that the petitioner is not liable to pay any contribution to the appellant/respondent and set aside the proceedings of the first appellant/1st respondent, dated 20.11.1992 but rejected the prayer for permanent injunction

by stating that it is unnecessary in view of earlier reliefs.

5. Aggrieved over the above said decree and judgment passed by the Employees Insurance Court/Principal District Court, Kanyakumari at Nagercoil, this Civil Miscellaneous Appeal has been filed by the appellants/respondents in the above said ESIOP. No. 4/1993.

6. The learned counsel appearing for the appellants mainly contended that the Employees Insurance Court/Principal District Court failed to consider the fact that required persons were employed and therefore, the establishment is covered under the ESI Act. Further, the Employees Insurance Court/Principal District Court wrongly held that the respondent was not using power on the basis that iron box was not found in the shop. The learned counsel appearing for the appellant further submitted that the letter Annexure to Ex. A1 was voluntarily signed by Managing partner and the respondent has not proved that it is obtained undue influence. Further the learned counsel submitted that the observation of the Employees Insurance Court/Principal District Court that the Inspect has failed to get the statement from the Employees of the respondent is baseless. Further Exs. A9 and A10 Wage Register reveal that 15 persons were employed and accordingly ought to have held that the respondent has established the coverage of ESI Act. It is further submitted that the observation of Employees Insurance Court/Principal District Court that the Tower Selection is a separate establishment, is not correct and therefore, the decree and judgment passed by the Employees Insurance Court/Principal District Court is not correct and prayed for setting aside the above said decree and judgment and confirmed the order passed by the first appellant/first respondent.

7. Per contra, the learned counsel appearing for the respondent/petitioner submitted that the provision of ESI Act only applicable to the establishment, where employed 20 or more persons. Since the respondent/petitioner never employed more than 15 persons in their establishment viz., "Tower Readymades" at any time, the provisions of the Act are not applicable to the establishment of the petitioner. It is further submitted that the 1st appellant/first respondent failed to note that the appellant establishment viz., "Tower Readymades" and the Management of Establishment called "Tower Selection" are separate partnership firm and separately assessed both establishments under TNGST Act and Income Tax Act and also failed to note that there is no interchange of employees between the petitioner Firm and Tower Selection and also failed to consider both the establishments doing independent business and maintain separate cash counter in ground floor and first floor respectively independently. Therefore, the Employees Insurance Court/Principal District Court has correctly held that both the establishments are different establishment. The learned counsel appearing for the respondent/petitioner further submitted that the alleged letter given by P.W. 2 to the 2nd appellant/2nd respondent on 03.06.1991 is not a genuine document, since the 2nd appellant/2nd respondent, who visited the establishment on 03.06.1991, obtained a leaf of letter heads of the petitioner

and he went out and brought a typed statement and obtained the signatures of P.W. 2 in the above said typed statements by exercising undue influence. Further P.W. 2 do not know to read and write in English and the statement was not read over and explained to the Managing partner in Tamil and copy of statement also was not furnished to him. Therefore the learned counsel pointed out that the Employees Insurance Court/Principal District Court has correctly held that the above said letter is not a genuine document and no illegality in the above said findings.

8. The learned counsel appearing for the respondent further submitted that the Employees Insurance Court/Principal District Court has correctly discussed about the oral and documentary evidence adduced on either side and also considered Ex. A18 copy of Commissioner report and rightly held that from the physical features available in the above said building and also the record maintained in both establishments clearly proved that both establishments are different establishments and not the same establishments and hence, no interference needs in the above said correct findings of the trial Court.

9. Considering the contention raised by both sides in this appeal, this Court has framed the following Substantial Questions of law for consideration:-

(i) On the facts and circumstances and in view of Ex. B1 was it proper for the lower Court to allow the application filed by the respondent?

(ii) Whether the contention of the respondent that less than 20 persons alone were employed sustainable in law, in view of Ex. A1 and the letter annexed to Ex. A1?

10. As already stated, the main contention of the appellants/respondents in the ESIOP 4/1993 is that both establishments i.e., the respondent/petitioner readymade shop viz., "Tower Readymades" shop situated in ground floor and also the shop viz., "Tower Selection" running in the first floor of the above said building are the same establishments and at the time of inspection of Officer of ESI Corporation, dated 03.06.1991 it was found that 15 employees in the ground floor and 6 employees in the first floor and total 21 employers were working at the time of inspection and therefore, the above said establishment is covered under the provisions of Employees State Insurance Act from 01.01.1991. Per contra, the contention of the respondent/petitioner is that readymade shop running in the ground floor is a separate partnership firm and the shop viz., "Tower Selection" is a separate partnership firm and the Management of both shops are independent and both establishments are separate assessee under the TNGST Act and Income Tax Act. Further both establishments have employed their own employees and there is no interchange of employees between both establishments and both establishments doing independent business and also separate way available in both establishments and therefore, the contention of the appellants/respondents is not correct. The learned counsel for the respondent/petitioner further submitted that the appellants/respondents

themselves admitted that 15 persons were employed in the "Tower Readymades" running by the respondent/petitioner at the time of inspection and the appellants/respondents failed to prove the fact that any Iron Box was used for manufacturing purpose by the respondent/petitioner at the time of inspection and therefore, the respondent/petitioner establishment is not covered under the provisions of ESI Act.

11. On the side of the respondent/petitioner establishment to prove their contention one R. Rabikoorthakuman, one of the working partner deposed as P.W. 1 and another partner viz., Sirajudin, who is the alleged person given letter to the appellant officials deposed as P.W. 2 and marked 25 documents. On the side of the appellants/respondents, the Manager, who is alleged to have inspected on 03.06.1991 viz., Jesu Rajesh deposed as R.W. 1 and another Inspector of ESI, who alleged to have visited on 26.09.1991 deposed as R.W. 2 and marked 12 documents on their side.

12. On the side of the appellants/respondents produced only two reports submitted by the Manager and Inspector of ESI Corporation and all other documents are notices, reply notices, proceedings of the first appellant/first respondent u/s 45-A. Except the above said documents, no other documents produced to prove that the respondent/petitioner viz., Tower Readymades and Another establishment viz., Tower Selection are one and the same establishment and all the employees are same establishment. Further, except the oral interested testimony of R.Ws. 1 and 2, who are employees of ESI Corporation, no other evidence to prove that both the establishments are one and the same establishments or running business under the same Management.

13. Per contra, on the side of the respondent/petitioner has produced Exs. P7 to P17 i.e., attendance register, payment register and also deed of partnership firm, proceedings of Commercial Tax Officer Ledger receipts, clearly show that all the documents only relating to the shop viz., "Tower Readymades". The documents produced by the respondent/petitioner i.e., Exs. P.20, 22 to 25 i.e., payment register, deed of partnership firm, order of commercial tax office, Ledger, Day-book reveal that the "Tower Selection" is a separate establishment. In this regard, the appellants/respondents official witness viz., R.W. 1 himself admitted at the time of evidence that in the ground floor selling readymades for children and women and in the first floor selling readymades for gents and children and inspected only the "Tower Readymades" and he has not inspected any other establishment. He further admitted that he has not seen any documents regarding payment of Income Tax and other Tax and further admitted that in the above said establishment not for manufacturing and only purchasing and selling readymades. He further deposed that at the time of inspection, he saw only 15 workers were working in the ground floor.

14. R.W. 2 clearly admitted in his evidence that both establishments running in the ground floor and first floor are separate partnership establishment and also admitted that he saw separate commercial tax register and also Income tax

registers for both establishments and both establishments are maintained separate attendance register. Therefore, from the admission of R.Ws. 1 and 2 itself clearly proved that both establishments are separate establishments as contended by the respondent/petitioner.

15. In the instant case, the appellants/respondents have mainly contended that P.W. 2 one of the partner viz., Sirajudin has given a letter in typed paper in which it is admitted that there were 15 employees working in ground floor and 6 employees working in the first floor totally 21 employees were working as found by the Inspector of ESI Corporation and the above said fact was admitted by P.W. 2 in his letter i.e., annexed with Ex. R1 and therefore, the impugned order passed by the first appellant/first respondent is sustainable and valid in law.

16. Per contra, the learned counsel appearing for the respondent/petitioner would submit that R.W. 1 viz., Jesu Rajesh, who was the employee of the appellant/respondent ESI Corporation visited the respondent/petitioner establishment viz., "Tower Readymades" on 03.06.1991 and at that time only P.W. 2 viz., Sirajudin, one of the partner was present and the above said witness do not know to read and write English and studied only 8th Standard and at the time of inspection, R.W. 1 obtained a leaf of letter heads of the respondent/petitioner and he went out and brought a typed statement and obtained the signature of the above said P.W. 2, Sirajudin in the typed statement by exercising undue influence and the above said documents was not read over and explained. Further, admittedly, copy of the statement also not given to him and therefore, on the basis of the above said letter cannot be presumed that both establishments are one and the same as contended by the appellants/respondents ESI Corporation.

17. At the time of evidence, R.W. 1, who is allegedly inspected the establishment on 03.06.1991 deposed that at the time of inspection taken notes in his diary and he also used to maintain weekly diary regarding inspection. Admittedly, on the side of the appellants/respondents have not produced the above said weekly diary in which inspection notes were recorded and no reason has been assigned on the side of the appellants/respondents particularly R.W. 1 for non production of material document. Therefore, the suppression of the above said material document itself clearly proved that the contention of the appellants/respondents cannot be accepted.

18. As rightly pointed out by the learned counsel for the respondent/petitioner both R.W. 1 or R.W. 2, who are Manager and Inspector of ESI Corporation, have not prepared the list of employees name, father's name, service particulars of all the above said employees. Further R.W. 1 or R.W. 2 have not obtained any statement from the any of the alleged 21 employees working in the ground floor and in the first floor of the building so as to prove both establishments are one and the same management. No reason has been assigned for not obtaining any statement from the employees or any other 3rd parties so as to prove the reports are genuine reports. Further, R.W. 1 or R.W. 2 have not taken any steps

to verify the registers in both establishments. No reason has been assigned for that also. R.Ws. 1 and 2 have admitted that they are not seen the alleged iron box used in the establishment and the above said fact alleged to have been stated only in the letter annexed with Ex. R1 report. Therefore, as rightly submitted by the learned counsel for the respondent/petitioner, the appellants/respondents miserably failed to prove the contention stated in the letter annexed in Ex. R1.

19. On the side of the appellants/respondents have not proved the fact that P.W. 2 one Sirajudin, knowing English, who alleged to have prepared the above said letter and handed over to R.W. 1. Except the oral testimony of R.W. 1, no other oral or documentary evidence to prove that the above said letter was typed and handed over by P.W. 2 to R.W. 1. Further, it is admitted fact that R.W. 1 has not given copy of the above said alleged letter given by P.W. 2 to him or obtained any signatures from others as witnesses. The appellants/respondents have failed to prove that the above said letter was given by P.W. 2 as alleged by R.W. 1. Therefore only on the basis of letter annexed in Ex. R1, the first appellant/first respondent passed an order is not correct, as rightly held by the trial Court.

20. In the instant case, during the pendency of the proceedings before the Insurance Court, Commissioner was appointed and he filed a detailed report Ex. A18 containing several pages. A careful reading of the entire Commissioner report clearly proved that both the establishments are different establishments and also both the establishments have separate set of employees, as rightly contended by the learned counsel for the respondent/petitioner. Further the Commissioner has stated in his report that he verified various records like Registration Certificate, Licence, Sales Tax receipts, R.C. Numbers, Letter pads, Attendance Registers, Wage Registers etc., and finally came to the conclusion and filed a report stating that both the establishments are separate establishment as contended by the learned counsel for the respondent/petitioner. Therefore, from the report of the Advocate Commissioner itself clearly proved the case of the respondent/petitioner and the trial Court viz., ESI Corporation Court also rightly discussed all the above said oral and documentary evidence and finally held that both establishments are different establishments and not same establishment and the employees are not more than 20 as contended by the appellants/respondents or as deposed by R.W. 1 and R.W. 2, who are Inspector and Manager of appellants/respondents ESI Corporation.

21. The learned counsel for the appellants/respondents further submitted that in the letter given by P.W. 2 viz., Sirajudin, which is annexed with Ex. R1 report, he stated that iron box was used in the establishment and therefore even below 20 workers in the establishment, ESI Act applicable to the respondent/petitioner establishment. In the instant case, except the above said alleged averment in the letter, no other documentary or oral evidence to prove the above said fact. As already discussed, the above said alleged letter given by P.W. 2 also not proved as genuine documents. R.Ws. 1 and 2, who are the employees of appellant ESI

Corporation themselves admitted that at the time of inspection they have not seen any Iron Box in the establishment. Therefore, the ESI Court has correctly discussed in detail and finally held that the respondent/petitioner is not using any iron box in the above said establishments.

22. In the above said circumstances, the learned counsel for the respondent/petitioner relied on the following decisions:-

(i) The decision of Hon'ble Karnataka High Court reported in *Regional Director, E.S.I. Corporation Vs. Karnataka Asbestos Cement Products and Another*, wherein it has been held as follows:-

In determining whether an establishment employs the number of persons required by the Employees' State Insurance Act, 1948, to attract the provisions of the Act, a list of employees prepared by the E.S.I. Inspector, in the course of his visit to the establishment, must contain the name, father's name, place from which the employee hails, the designation, the length of service and the signature or thumb impression of the employee, as the case may be, if at that time persons other than the employee are present the name and addresses of at least two of them with the signatures and also the signatures of the proprietor or manager or the person-in-charge of the establishment should be obtained at the end of the list and a copy of the list should be furnished to the establishment.

(ii). In another decision of Hon'ble Bombay High Court reported in *Mumbai Mazdoor Sangh Vs. Regional Provident Fund Commissioner and Others*, wherein it has been held as follows:-

The Court observed that the factual position was that except for the fact that the second respondent owned the two units, there were several features indicating that they were different and separate establishments. The activities of the two units, their workers, their registration under statutes, books of account managerial staff were all separate. The two did not have any interconnection in the matter of supervision, finance or managerial control.

(iii) In yet another decision of Hon'ble Apex Court reported in *Hotel New Nalanda Vs. Regional Director, E.S.I. Corporation*, in which it is stated in para. 11 and 12 as under:-

11. We are unable to appreciate the way the High Court considered the evidence and deemed fit to interfere with the finding of fact recorded by the Insurance Court. The High Court seems to have taken the inspection report exhibit D2 and the testimony of the Insurance Inspector D.W. 1 as non-rebuttable, conclusive pieces of evidence. Further, for filling-up what remained unsaid in the inspection report and the testimony of D.W. 1, it took recourse to presuming that the establishment must have kitchen where food would be cooked using two appliances running with the aid of power. The High Court did not even advert to the reasons given by the Insurance Court for not accepting the Corporation's case on that issue. The Insurance Court had rightly pointed out that the

inspection report did not state the process or the work that was called "the manufacturing process". It did not even say that the refrigerator and the grinder were used in connection with cooking food in the establishment.

12. For holding an establishment to be "a factory" within the meaning of Section 2(12) of the Act it must first be established that some work or process is carried on in any part of the establishment that amounts to "manufacturing process" as defined u/s 2(k) of the Factories Act, 1948. In case the number of persons employed in the establishment is less than twenty but more than ten then it must further be established that the manufacturing process in the establishment is being carried on with the aid of power. Further, the use of power in the manufacturing process should be direct and proximate. The expression "manufacturing process being carried on with the aid of power in Section 2(12) of the Act does not mean a very indirect application of power such as use of electric bulbs for providing light in the work-area. Unless the links are established, that is to say, it is shown that some process or work is carried on in the establishment which qualifies as "manufacturing process" within the meaning of Section 2(k) of the Factories Act and the manufacturing process is carried on with the aid of power, the mere presence of a refrigerator and a grinder there, even though connected to the main power line may not necessary lead to the inference that the establishment is a factory as defined u/s 2(12) of the Act.

23. As already discussed, in the instant case, the appellants/respondents not contended that the respondent/petitioner has doing any manufacturing process. Admittedly, only buying and selling cloths in their establishments. Further, it is proved by the respondent/petitioner that only 15 employees were working in their establishment and also proved that no iron box was used in their establishment for the purpose of any manufacturing process. Further, the appellants/respondents have not pleaded and proved that the respondent/petitioner has used iron box for manufacturing purpose and in the above said circumstances, even assuming that iron box was there at the time of inspection, as per the above said decision relied on by the respondent/petitioner, cannot be presumed it was use for manufacturing purpose. Therefore, the respondent/petitioner establishment is not a factory/establishment, as per Section 2(12) of the Act.

24. From the above said discussion, it is clear that the respondent/petitioner running business i.e., "Tower Readymades" in which only 15 employees were working at the time of inspection and also not proved iron box was used for manufacturing purpose and therefore, the findings of the ESI Court in the judgment and decree is valid in law, as contended by the learned counsel for the respondent/petitioner. Further, the appellants/respondents challenged the finding of the ESI Court/trial Court, but it is purely question of fact, not question of law or substantial question of law and hence, this Civil Miscellaneous Appeal is not maintainable and is liable to be dismissed and answered both substantial Questions of law framed by this Curt accordingly. In the result, the Civil

Miscellaneous Appeal is dismissed and confirmed the decree and judgment passed in ESIOP 4 of 1993 on the file of ESI Court, cum Principal District Court, Kanyakumari at Nagercoil. No costs.